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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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DUPLICATE

JUN 11 2012

FCC Mail Room

In re Application of

WPEO RADIO FOUNDATION, INC.

For minor modification of facilities  
FM Translator Station  
W277AQ Canton, Illinois

FILE NO. BPFT-20120413ACM  
FAC ID No. 149355

To: Office of the Secretary  
Attn: Audio Division

2012 JUN 11 P 2 PM

JOINT REPLY TO OPPOSITION TO INFORMAL OBJECTION

Nelson Broadcasting, Inc., ("NBI") and American Education Foundation, Inc., ("AEFI") (NBI and AEFI jointly referred to herein as "Petitioners"), by their counsel, hereby jointly reply to the opposition filed by WPEO Radio Foundation, Inc., ("WPEO") in the above-captioned matter. In support thereof, the following is shown:

The Cromwell Waiver standard clearly requires that the proposed FM translator facility be mutually exclusive with the licensed facility or there be some other legitimate justification to abrogate the Ashbacker rights of potential applicants.<sup>1</sup> As discussed below, WPEO fails to show sufficient compelling legitimate justification and public interest benefits required to clear the "high hurdle"<sup>2</sup> needed to justify a Commission waiver of the mutual exclusivity criteria of the Cromwell Waiver. Having failed to demonstrate that the Commission erred by including a mutual exclusivity element to the Cromwell Waiver standard; that the Cromwell Waiver is not sufficiently tailored; or that the public interest would be served by a modification of the Cromwell Waiver standard,

<sup>1</sup> See, e.g., Letter to Russell M. Perry, Station K221FQ, DA 12-866, dated June 1, 2012.

<sup>2</sup> WAIT Radio v. FCC 418 F2d 1153, 1157 (D.C. Cir. 1969).

WPEO has failed to justify its waiver request. WPEO's application should be denied or dismissed.

The WPEO Opposition cites a number of translator CP applications which are not relevant to its own application. WPEO identifies several granted non-adjacent channel minor change applications which satisfied the non-adjacent displacement waiver policy but which did not invoke Cromwell Waivers. In addition, it lays out a series of granted mutually exclusive Cromwell Waivers. These applications are distinguishable from W277AQ as each application was processed pursuant to applicable waiver policies. WPEO fails to show any compelling circumstance presenting legitimate justification to waive the mutual exclusivity requirement for W277AQ. Finally, WPEO does not rebut the harm to the greater public interest as outlined in Letter to John F. Garziglia, Station W263AQ, Mattoon, IL, DA 11-1495, dated September 2, 2011, nor does it describe how waiving the Cromwell Waiver requirement that there be mutual exclusivity between the proposed and licensed facilities is consistent with the narrowly tailored limited instances where the Commission has waived mutual exclusivity in the FM translator service.<sup>3</sup> Accordingly, WPEO is unavailing in its attempts to undermine the Ashbacker Doctrine with the argument that the Commission "has consistently given [displacement] relief priority of the inchoate unknown desires of potential third party applicants."<sup>4</sup>

The Informal Objection demonstrates that, among other things, WPEO failed to show that a Cromwell Waiver is necessary as the sole option available to resolve W277AQ's displacement at Canton. Indeed, WPEO's Opposition and its Exhibit 2 concedes that WPEO has chosen not to pursue engineering solutions which are compliant

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<sup>3</sup> See, e.g., 1998 Biennial Regulatory Review, Notice of Proposed Rulemaking, 13 FCC Rcd 14859 (1998) and 1998 Biennial Regulatory Review, First Report and Order, 14 FCC Rcd 5272 (1999)

<sup>4</sup> Opposition at p. 8.

with Commission rules and policies and would avoid waiver of the mutual exclusivity element of the Cromwell Waiver. To quote WPEO, "106.3 MHz and 106.5 MHz are available."<sup>5</sup> In other words, for its own business reasons, WPEO has elected not to apply for, or modify its present application to propose, a displacement channel which is available for displacement at Canton and will satisfy the requirements of a Cromwell Waiver, thus demonstrating that waiver of the mutual exclusivity criteria of the Cromwell Waiver is not required.

WPEO remarks that AEFI's station W277AT is displaced by the same primary station which has displaced WPEO's 277AQ and infers that it is wrong for AEFI to oppose the W277AQ application. As noted in the statement attached hereto under penalty of perjury from AEFI's principal, Larry Nelson, AEFI reacted to the CH277 displacement appropriately and differently than WPEO. Prior to filing AEFI's displacement application BPFT-20120404AAW Mr. Nelson made informal contact with FCC staff concerning the Commission's FM translator displacement and Cromwell Waiver processing guidelines. Mr. Nelson advises that he discussed the Cromwell Waiver requirements with FCC staff, including the option of an application proposing waiver of the mutual exclusivity criteria of the Cromwell Waiver policy. In reply, Commission staff advised Mr. Nelson that it would not grant such a Cromwell Waiver, as mutual exclusivity between the FM translator licensed contour and the proposed facility is a requirement. Further, the staff told Mr. Nelson that in a translator displacement scenario, it was permissible to apply for a minor change non-adjacent channel and, after that CP was granted and the station constructed, apply for a facilities modification relying on a mutually exclusive Cromwell Waiver. Thereafter, and in reliance on this advice,

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<sup>5</sup> WPEO Opposition @ p. 10.

W277AT filed its displacement application BPFT-20120404AAW proposing CH298.

This application was granted and the modified facilities constructed. After constructing facilities on CH298 at Havana, AEFI filed a minor modification application which is mutually exclusive with its current facilities and includes a compliant Cromwell Waiver request.<sup>6</sup> CH298 is the only mutually exclusive channel available to AEFI at Peoria.

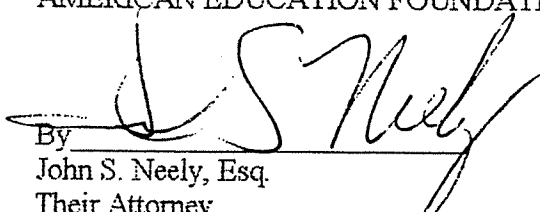
It is respectfully submitted that, having failed to present a compelling showing to justify waiver of the mutual exclusivity component required for a Cromwell Waiver, WPEO's waiver requests and application should be denied and dismissed.

Respectfully Submitted,

NELSON BROADCASTING, INC.  
AMERICAN EDUCATION FOUNDATION, INC.

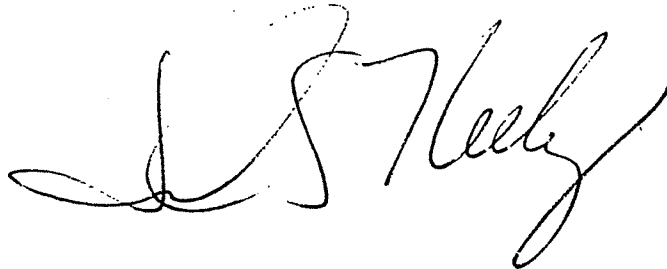
June 8, 2012

Miller and Neely, P.C.  
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Bethesda, MD 20815

By   
John S. Neely, Esq.  
Their Attorney

I certify that on June 8, 2012, a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

BARRY D. WOOD, Esq  
WOOD, MARTIN & HARDY, PC  
3300 FAIRFAX DRIVE, SUITE 202  
ARLINGTON, VA 22201



<sup>6</sup> See File No. BPFT-20120511ABB.

## STATEMENT

I, Larry Nelson, am corporate president of American Education Foundation, Inc., licensee of FM translator station W277AT Havana, Illinois. I have reviewed the Opposition to Joint Informal Objection prepared by WPEO Radio Foundation, Inc., dated May 25, 2012. I prepared the following statement in response.

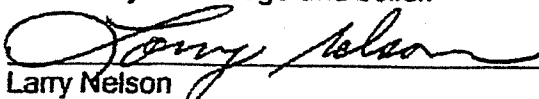
Station W277AT has operated for many years on CH277 at Havana, IL. However, the translator has been displaced by a construction permit issued to co-channel primary station NEW(FM) Canton, IL, FAC ID 184672. To accommodate displacement, it was necessary for AEFI to seek a minor modification of translator facilities including a new frequency. While assessing application proposal options, I initiated an informal discussion with FCC staff concerning current FM translator application processing policies for displacement and Cromwell Waiver. In that discussion, I learned that the Commission would not process any W277AT displacement application proposing CH 277/103.3.

I described that I was interested in modifying W277AT facilities to rebroadcast an AM station licensed to a sister company using a Cromwell Waiver. In exploring the processing policies for a Cromwell Waiver, it was made clear to me that W277AT's constructed translator facilities must be mutually exclusive with the translator's proposed facilities. I was told that staff would not grant a Cromwell Waiver relying upon a mutual exclusivity from a hypothetical tower site or a mutual exclusivity with authorized but unbuilt FM translator facilities. In order to satisfy a Cromwell Waiver, I must first construct authorized displacement facilities which would be mutually exclusive with facilities proposed in the Cromwell Waiver application, and the FM translator must have no history of serial hopping minor mod applications, and the Cromwell proposed FM translator will rebroadcast an AM station.

AEFI followed Commission guidance and filed displacement application BPFT-20120404AAW for W277AT well before and without any knowledge of WPEO's plans. After the W277AT CP was granted, facilities were constructed and the translator is now operating on CH298. A Cromwell Waiver minor mod application is pending: BPFT-20120511ABB.

CH298 is the only mutually exclusive channel available to AEFI. AEFI must now use that frequency to move and rebroadcast WOAM(AM). WOAM is a struggling, stand alone, independently owned AM station in the Peoria market providing unique live local programming.

I certify under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief.

  
Larry Nelson

Date: 6/8/12